



[4410-05P]

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 552

Use of chemical agents or other less-than-lethal force in immediate use of force situations.

[BOP-1167-P]

RIN 1120-AB67

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes to amend its regulation on the use of chemical agents or other less-than-lethal force to provide that such use is authorized for staff in immediate use of force (emergency) situations.

DATES: Written comments must be submitted on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah N. Qureshi, Rules Unit, Office of General Counsel, Bureau of Prisons, phone (202) 353-8248.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

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not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Additional Information" paragraph.

Discussion.

In this document, the Bureau of Prisons (Bureau) proposes to amend its regulations to explicitly authorize staff to utilize chemical agents or other less-than-lethal force in immediate use of force (emergency) situations. We also make a few minor edits for clarification and organization. We describe the proposed changes in further detail below.

At the outset, we note that we are replacing the term "weapons" with the term "devices" both in the title and the body of the regulation. This is consistent with terminology used in Department of Justice policy describing the use of less-than-lethal force.

§ 552.25 Use of less-than-lethal devices, including chemical agents - new paragraph (a).

Currently § 552.25 allows the Warden to authorize the use of less-than-lethal devices, including chemical agents, when the

situation is such that a delay in action would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage, and the inmate is either armed and/or barricaded; or cannot be approached without a danger to self or others. The Warden may delegate his authority to one or more supervisors on duty and physically present, but not below the position of Lieutenant.

In addition, under current § 552.21(d), the use of less-than-lethal devices could also be appropriate "where the facts and circumstances known to the staff member would warrant a person using sound correctional judgment to reasonably believe other action is necessary (as a last resort) to prevent serious physical injury, or serious property damage which would immediately endanger the safety of staff, inmates, or others." Although this language indicates that a staff member in a situation where he or she reasonably believed action was necessary *could* use less-than-lethal force to "prevent serious physical injury, or serious property damage which would immediately endanger the safety of staff, inmates or others," use of less-than-lethal devices, including chemical agents, by staff in immediate use of force (emergency) situations is not explicitly authorized.

The Bureau therefore proposes to amend § 552.25 by adding a new paragraph (a), clearly indicating that "Staff are authorized to use chemical agents or other less-than-lethal devices in immediate use of force situations pursuant to this subpart."

Current BOP regulations already define the parameters for immediate use of force situations. Section 552.21(a) currently defines "immediate use of force," stating that "[st]aff may immediately use force and/or apply restraints when the behavior described in § 552.20 constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order." Section 552.20 authorizes Bureau staff to use force only as a last alternative, and only to the extent necessary to address the inmate behavior which threatens the safety, security and good order of the facility, or protection of the public.

Bureau of Prisons staff frequently respond to critical incidents and dangerous situations in Bureau facilities. Several incidents in recent years have resulted in injury to Bureau staff. Inmate attacks on staff continue to escalate, evolve and diversify, recent attacks have proceeded quickly, with more planning than in previous dangerous encounters. Sudden violent large-scale incidents involving large numbers of inmates, require immediate

action. Measures are therefore necessary to ensure that staff are clearly authorized to promptly and safely control inmates during violent situations and mitigate the risk of serious bodily harm. This rule change would directly authorize staff to carry less-than-lethal devices for deployment in immediate use of force (emergency) situations.

The goal of the proposed rule is to increase the safety of staff and inmates when staff respond to incidents involving violence, and to prevent injury to staff and inmates due to an assault or serious resistance to staff control. The rule will provide staff with immediate access to a less-than lethal-device, enabling quick containment of incidents, reducing opportunities for injuries to staff and inmates. Currently, responders to dangerous encounters do not have self-protection capability without direct physical contact with involved inmates. There have been occasions where disruptive inmates have resisted control techniques by responding staff. In some instances, inmates armed with weapons have turned their attacks on staff. Staff have also responded to critical incidents on recreation yards which were not successfully interrupted by verbal commands and the non-immediate discharge of one or more less-than-lethal devices and warning shots. These dangers increase the potential for assaults and injury, both to staff

and to other inmates, and pose a general risk to the safety and security of the facility.

The use of less-than-lethal devices has become accepted throughout the law enforcement community. Correctional staff at the majority of state and local correctional facilities routinely carry and utilize less-than-lethal devices to protect themselves from inmate attacks and prevent dangerous encounters from escalating. Several of these state agencies have allowed line staff to utilize less-than-lethal devices for more than a decade.

National Institute of Justice (NIJ) studies of the use of chemical agents published in 1997 (Evaluation of Pepper Spray. NJC 162358, February 1997, by Steven M. Edwards, John Granfield, and Jamie Onnen (8 pages).) and 2003 (The Effectiveness and Safety of Pepper Spray. NJC 195739, April 2003, by National Institute of Justice (19 pages).) documented similar increases in compliance and reductions in injuries in community law enforcement situations. Although the study did not examine use of chemical agents in correctional settings, the long term studies by NIJ show that the use of force complaints, injuries to officers, and injuries to aggressive persons have fallen significantly anywhere less-than-lethal force is an option.

Based on the above information and the authority already

provided in § 552.21(d), the Bureau conducted a limited test of the usefulness and effectiveness of staff use of less-than-lethal devices (Oleoresin Capsicum [OC, or MK-4]) in select Bureau facilities. During the period from October 15, 2012 to March 14, 2013, the Bureau found that the average containment time in facilities using OC in immediate use of force situations was 2.93 minutes, as compared to the 5.48 minutes in facilities which did not use any less-than lethal weapon in immediate use of force situations. In other words, the use of OC resulted in an average containment time that was a full 2.55 minutes faster.

We therefore make this change to increase the safety of staff and inmates when staff respond to incidents involving violence, and to prevent injury to staff and inmates due to an assault or serious resistance to staff control, by providing staff with immediate access to a less-than lethal-device, thereby enabling quick containment of incidents and reducing opportunities for injuries to staff and inmates.

**§ 552.25 Use of less-than-lethal devices, including chemical agents
– paragraph (b) .**

The Bureau also proposes to redesignate current § 552.25(a) and (b) into paragraph (b) and (c), respectively. The only changes made

are non-substantive conforming changes to accommodate new paragraph (a), as described above. The wording and intent of this language remains the same.

Executive Orders 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation and in accordance with Executive Order 13563 "Improving Regulation and Regulatory Review" section 1(b) General Principles of Regulation.

The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget. This rule is a delegation of authority from the Director of BOP to explicitly authorize the use of less-than-lethal devices in immediate use of force (emergency) situations.

Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

Executive Order 13132.

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act.

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This regulation pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of

the Bureau of Prisons. Its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995.

This regulation will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996.

This regulation is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 571:

Prisoners.

Kathleen M. Kenney
Assistant Director/General Counsel
Federal Bureau of Prisons

Under rulemaking authority vested in the Attorney General in 5 U.S.C 301, 28 U.S.C. 509, 510, and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we propose to amend 28 CFR part 552, chapter V, subchapter C, as follows:

SUBCHAPTER C - INSTITUTIONAL MANAGEMENT

PART 552 - CUSTODY

1. The authority citation for part 552 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

2. Revise § 552.25 to read as follows:

§ 552.25 Use of less-than-lethal devices, including chemical agents.

(a) Staff are authorized to use chemical agents or other less-than-lethal devices in immediate use of force situations

pursuant to this subpart.

(b) For situations other than immediate use of force situations, the Warden may authorize the use of less-than-lethal devices, including those containing chemical agents, only when a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage, and the situation is such that the inmate:

- (1) Is armed and/or barricaded; or
- (2) Cannot be approached without danger to self or others.

(c) The Warden may delegate the authority under paragraph (b) to one or more supervisors on duty and physically present, but not below the position of Lieutenant.

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